83-6568

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY BATTLE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Cause No.
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

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TABLE OF AUTHORITIES

OPINION BELOW

The opinion of the Missouri Supreme Court is recorded at 661 S.W.2d 487 (Mo. banc 1983). A copy of this Opinion appears in Appendix A, infra.

JURISDICTIONAL STATEMENT

The petitioner, Thomas Henry Battle, was sentenced to death on January 6, 1984, for the offense of Capital Murder.

The judgment and sentence of the trial court affirmed in the Missouri Supreme Court on November 22, 1983. An application for rehearing was denied on December 20, 1983 (Appendix B, infra).

On January 3, 1984, this Court issued an order staying the execution of the petitioner, until such time as his appellate remedies are completed.

Petitioner filed this writ within sixty days after the entry of final judgment in this case, and invokes the Court's jurisdiction under 28 U.S.C. Section 1257 (Appendix C, infra) to review the judgment below by Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SYSTEMATIC EXCLUSION OF VENIRE PEOPLE WHO HAVE RELIGIOUS BELIEFS CONCERNING THE UTILIZATION OF THE DEATH PENALTY BY THE MISSOURI JUDICIAL SYSTEM CONSTITUTES THE UNLAWFUL EXCLUSION OF A SIGNIFICANT MINORITY GROUP FROM THE JURY PANELS OF ALL CAPITAL MURDER JURY TRIALS, IN DEROGATION OF THIS COURT'S DECISION IN DURAN v. MISSOURI.

II. WHETHER THE TRIAL COURT FAILED TO SUPPRESS EVIDENCE GLEANED THROUGH PRE-TRIAL CUSTODIAL INTERROGATION AFTER THE DEFENDANT HAD REQUESTED BUT HAD NOT RECEIVED COUNSEL, IN DEROGATION OF THE SIXTH AMENDMENTS RIGHT TO COUNSEL AS INTERPRETED BY EDWARDS v. ARIZONA, 451 U.S. 477 (1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution: Articles VI, VIII, and XIV. Statutory provisions: 565.008 (1) (R.S.Mo. 1978), 565.012 R.S.Mo. Supp. 1982, and 565.006 R.S.Mo. Supp. 1982. See Appendix D.

PARTIES

In the Missouri Supreme Court, the parties were: State of Missouri, respondent, and Thomas Henry Battle, appellant, in cause number 63,436.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

PETITION FOR CERTIORARI

Petitioner, Thomas Henry Battle, respectfully requests that writs of certiorari issue to review the judgments of the Supreme Court of Missouri in this case.

STATEMENT OF THE CASE

This petition asks the Court to consider two separate controversies. First, whether the accused received a fair trial on the question of guilt or innocence where the prosecutor challenges for cause all jurors in the minority group of people whose religious beliefs prevent them from voting for the death penalty. Secondly, whether the trial court denied the defendant his sixth amendment right to counsel by failing to suppress evidence gleaned by pre-trial custodial interrogation after the defendant requested counsel.

In order to clarify the facts pertaining to each of these disparate issues, the following factual statements detailing the development of these controversies will be divided into two parts which correspond to the three separate controversies.

A.

On July 13, 1981, before the Honorable George A. Adolf, Circuit Court, City of St. Louis, State of Missouri, the State brought Thomas Henry Battle to trial for the murder of one Birdie Johnson. As procedures require the two attorneys commenced voir dire. During voir dire the Court excused seven venire people for cause. (L.F. 24-115). These venire people included #84 James Fannon, #157 Mary Kelso, #120 Katie Ingram, #189 Richard McCarthy, #242 Mary Ray, #197 Cleo Morrison, and #301 Sylvia Van Lopik. All seven of these jurors stated they could not impose the death penalty because they had religious beliefs which dictated against killing. (T. 24-115). None of the seven struck jurors stated they would not convict a man of capital murder, nor did they state that their religious qualms as to killing would have any impact on their fairness or impartiality as triers of fact for the defendants guilt or innocence. (T. 24-115). The prosecutor based his request to strike each of the seven for cause in the State v. Blair 638 S.W.2d 739 line of

Missouri cases which improperly adopted this Courts decision in Witherspoon v. Illinois 391 U.S. 510, 88 S.Ct. 1170, 20 L.Ed. 2d 776 (1968). The trial court granted his motions to strike, and denied defense counsels objections thereto. (L.F.). Defense counsel raised the issue of religious belief causing exclusion from the jury panel which decides guilt or innocence in the direct appeal. The Missouri Supreme Court failed to review the trial courts actions in depth and anologized this cases's situation to its decision in State v. Blair 638 S.W.2d 739 (Mo. banc 1982). Cert. denied, 103 S.Ct. 838 (1983).

B.

On July 16, 1980, (T. 594) the St. Louis Police detained Thomas Henry Battle in order to question him about the murder of Ms. Birdie Johnson. On the day of interrogation Battle was eighteen (18) years old. He had completed eighth grade, and had never committed a felony. The police interviewed Battle in a small cubicle for a substantial part of one day. During the questioning the police decided to designate Battle a suspect in the case. They advised him orally of his Miranda rights, including his right to counsel. Dispute exists whether Battle then executed a written waiver of these rights. Battle then recorded an audio statement denying killing the victim. Battle then asked to see his attorney. (T. 245). The police failed to wait for an attorney's presence and continued the questioning. Battle then made a second cassette tape in which he confessed to the murder. Counsel filed a motion to suppress the confession, based on the taint caused by lack of counsel after the defendant request. The trial court overruled defense counsel's motion. The prosecutor introduced the second confession as evidence at trial. Defense counsel objected to its introduction. The trial judge overruled

the objection. (T.)

Defense counsel raised defendants fifth amendment right to counsel on appeal. Counsel argued that this Courts precepts articulated in Miranda v. Arizona 384 U.S. 436, 86 S.Ct. 1602, (1966) requires counsel before further interrogation once defendant has requested an attorney. The Missouri Cupreme Court overruled that contention holding that the trial court evaluated the evidence, and in particular the credibility of the witnesses and that in its opinion the defendant had voluntarily made the confessions. The Court never dealt with defendants request for counsel, in fact it incorrectly stated that the defendant had not testified to an attorney request at trial. State v. Battle 661 S.W.2d 487 (1984). Defense counsel renewed his request for relief from Missouri's incorrect application of federal law in the Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue because the Missouri Supreme Courts' holding in State v. Battle 661 S.W.2d 487 (Mo. banc 1983) misconstrues recent decisions of this Court. This conflict appears in two distinct areas. 1) The defendants right of trial by jury of a fair cross-section of his community including minority groups under the Sixth Amendment to the United States Constitution and 2) The defendants right to counsel prior to further custodial interrogation once he has requested an attorney. This Court should issue a writ concerning the first issue because of the controversy which has developed bith in State Court and in Federal Court interpretations of Witherspoon v. Illinois 391 U.S. 510, 521, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). This Court should issue a writ concerning the second issue because the Missouri Supreme Courts decision in this case clearly conflicts with the Sixth Amendment guarantee of right to counsel as interpreted by this Court in ist series of decisions which began with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

A. THE CONTROVERSY OVER WITHERSPOON.

The Missouri Supreme Courts decision in State v. Battle 661 S.W.2d (Mo. banc 1983) misconstrues this Courts holding in Witherspoon v. Illinois 391 U.S. 510 (1968). In Witherspoon this Court held that States may strike for cause in capital murder trials, jurors who state (a) they automatically would vote against the death penalty, and (b) their attitude toward the death penalty would prevent them from being fair and impartial triers of the defendant's guilt or innocence. Witherspoon at 515. The Witherspoon Court recognized that opposition

to the death penalty does not impair a venire person's ability to decide guilt or innocence. Additionally, the Court recognized that venire people who oppose the death penalty constitute a significant minority within the greater population of a community. Without representation of that minority among venire people who can or will be chosen for the jury, defendants will not receive a trial by an impartial jury consisting of a fair cross-section of their community. U.S. Constitution, Amendment VI; Strauder v. West Virginia 100 U.S. 303, 25 L.Ed. 664 (1880).

> ...."In Illinois, as in other States, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.
>
> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule not standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more--and must do nothing less--than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment --of all who would be reluctant to pronounce the extreme penalty--such a jury can speak only for a distinct and dwindling minority."
>
> Witherspoon at 519-520.

This Court has continued to uphold the sixth amendment right to trial by a jury composed of a fair cross-section of the community in light of its decision in Witherspoon. In Duncan v. Louisiana 419 U.S. 522 (1975), this Court struck down criminal convictions where the sentencing juries had been gleaned from a jury-selection system which excluded women disproportionately to their numbers in the community at large.

The Duncan Court based its decision not only on the equal protection clause of the fourteenth amendment as it had in Strauder and Hernandez v. Texas 347 U.S. 475 (1954) but also read in conjunction with the Court's supervisory role as it had in the Thiel v. Southern Pacific Co. 328 U.S. 217 (1946), but also on the sixth amendment itself.

> ..."This prophylactic vehicle [the jury] is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community partipation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury deawn from a pool broadly representative of the community as well as impartial in a specific case."
>
> Duncan at 530.

In Duren v. Missouri 439 U.S. 35, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979) this Court drew the threads of Strauder, Thiel, Witherspoon, and Duncan together to form a more concrete standard by which to evaluate the fair cross-section requirement of the Sixth Amendment. The Duren Court articulated a tripartite test to establish a prima facie violation of the cross-section requirement. The test's first element requires that the excluded venire people are members of a "distinctive group in the community." The second element requires that representation of this group in venires is "not fair or reasonable in relation to the number of such persons in the community." The final element states that the "systematic exclusion of the group in the jury selection process" must cause the underrepresentation. Duren, supra at 364.

People who oppose the death penalty, clearly fit within the definition of a currently excluded significant minority group under the Duren criteria. This Court has continually recognized

people who oppose the death penalty as constituting a unique group in our society.

> ...."Yet, in a nation, less than half of whose people believe in the death penalty...[16]

[16] It appears that, in 1966, approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. II, No. 3, at 84 (1967). In 1960, the comparable figures were 51% in favor, 36% opposed, and 13% undecided."

Witherspoon, supra at 520.

Although the Court handed down the Witherspoon decision some years ago, this minority has not disappeared. In fact, a variety of studies have demonstrated the great impact their exclusion is having on the American system of justice. See Bronson, on the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 Colorado L.Rev. 1 (1979); Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict?; Some Evidence From California, 3 Woodrow Wilson J. Law 11 (1981). H. Zeisel, Center for Studies in Criminal Justice, University of Chicago Law School, Some Data on Juror Attitudes Toward Capital Punishment, Monograph 1968; F. Goldberg, Toward Expansion of Witherspoon Capital Scruples, Jury Bias, and the Use of Pysch-ological Date to Raise Presumptions in the Law, 5 Harv. C.R.C.L. Law Rev. 53 (1970); G. Jurow, New Data on the Effects of a Death-Qualified Jury on the Guilt Determination Process, 84 Harv. L.Rev. 587 (1970). Jury's, the Fair Cross-Section in Death Juries, 15 Creighton L.Rev. (19); A New Look at Death-Qualified Juries, 18 Am.Crim.L.Rev. 24 (1983).

The second prong of the Duren test requires that the number of members of the minority in venires is not fair or unreasonable in relation to the numbers of the minority in the community at

large. This situation clearly exists in Missouri. Prosecutors regularly strike all venirepeople who state they have religious scruples or any scruples against the death penalty. The prosecutors strike these venirepeople with strikes for cause. The Missouri Supreme Court has routinely upheld these strikes. In State v. Mitchell 618 S.W.2d 223 (Mo. 1981); State v. Newlon 627 S.W.2d 606 (Mo. banc 1982); State v. Mercer 618 S.W.2d 1 (Mo. banc 1981); and State v. Bolder 365 S.W.2d 673 (Mo. 1982). That Court upheld the death penalty convictions of the various defendants despite the trial courts exclusion, for cause, of venirepeople who stated they did not believe in the death penalty. In none of those cases did the strike for cause rest on the jurors inability to decide the guilt or innocence issue fairly. The Missouri Supreme Court found the strikes to rest on the venirepeoples responses to the prosecutors questions about beliefs in and about the death penalty. That Court rested its decision in this case on the same reasoning.

The United States District Court for the Western District of North Carolina ruled on the issue at hand in Keeten v. Garrison F.2d (Jan. 12, 1984). In Keeten, the Court held that excluding venirepeople from the jury which decides guilt or innocence in a capital murder trial denies said defendants their constitutional right to a trial by a jury of their peers taken from a representative cross-section of their community.

The time has come for this Court to clarify the effect of Witherspoon on the selection of venirepersons in capital murder cases. Can the prosecutors through Witherspoon strike for cause people whose religious beliefs do not interfere with the determination of guilt of innocence but does interfere with the penalty phase in a state where bifurcated adjudication processes exist.

B. THE RIGHT TO COUNSEL ONCE REQUESTED

This Court should issue a writ in this case not only because of the conflicting interpretations of the Witherspoon case, above-mentioned, but also because of the Missouri Supreme Courts refusal to apply this Courts well-developed principles conserning accused's right to counsel once he has so requested in State v. Battle 661 S.W.2d 487 (Mo. banc 1983).

In Battle the Missouri Supreme Court stated that no need existed to apply this Courts well-established doctrines concerning the right to counsel because the defendant did not testify that he requested counsel. Battle at . In fact, the record clearly demonstrates that defendant did testify that he requested counsel. Bith the transcript (T. 245) and the appellants brief on direct appeal alerted that Court to the fact of defendants request.

This Court long ago established criminal defendants right to counsel. In Powell v. Alabama 287 U.S. 45 (1982) this Court set aside the convictions of eight youths because of inadequate appointment of counsel. Justice Sutherland explained that "the right to aid of counsel is one of this fundamental character" which the fourteenth amendment associates with a hearing. He went on to state:

> ..."The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the

> proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."
>
> Powell, supra at 68-69.

In Johnson v. Zerbst 304 U.S. 458 (1938) this Court expanded its mandate in Powell to mandate absolutely the appointment of counsel for indigent defendants in federal court. In Hamilton v. Alabama 368 U.S. 52 (1961) this Court stated that assistance of counsel was a constitutional requisite in capital cases. The case of Gideon v. Wainwright 372 U.S. 335 (1963) extended this Courts absolute mandate of assistance of counsel to state cases as well as federal. Up until Coleman v. Alabama 399 U.S. 1 (1970) the mandate requiring counsel applied only to trial. In Coleman the Court extended that right to critical stages requiring counsel. In Coleman the critical stage was the preliminary hearing. In Escobedo v. Illinois 378 U.S. 478 (1964) this Court named pre-trial custodial interrogation a "critical stage."

> ...."[W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution, as made obligatory upon the states by the Fourteenth Amendment."
>
> Escobedo, supra at 490-491.

This Court reiterated its absolute mandate of counsel when it augmented its reliance on the sixth amendment right to counsel with the fifth amendment's self-incrimination clause in Miranda v. Arizona 384 U.S. 436 86 S.Ct. 1602 (1966). The new rationale espoused in Miranda allowed defendants who had at one point waived their right to counsel to reassert that right at any

point in the proceeding. As the Miranda Court stated:

> ....If the individual states he wants an attorney the interrogation must cease until an attorney is present. At that time, the individual msut have an opportunity to confer with the attorney and to have him present during subsequent questioning."
>
> Miranda, supra, at 473-474.

Although this Court decided Miranda a little less than two decades ago, the mandate still stands. As recently as 1977 this Court reiterated the importance of defendants right to counsel whenever he so asks. In Brewer v. Williams 430 U.S. 387 (1977) this Court held that police had violated defendants right to counsel when they conducted an informal post-arraignment interrogation without counsel when defendant had already requested. See also United States v. Wade 388 U.S. 218.

This Court has continually mandated the importance of counsel to the criminal defendant. The standard articulated leaves no doubt. Once counsel is requested, police violate the defendants constitutional rights if they do not provide him with one prior to continued questioning. The Missouri Supreme Court ignored this Courts clear mandate with it held that defendant Battle had not been denied his constitutional rights. State v. Battle 661 S.W.2d 487 (Mo. banc 1983). Therefore, this Court should overturn that Courts decision, and remand this case for rehearing with the tainted confessions suppressed.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 18th day of February, 1984, to John Ashcroft, Attorney General, Supreme Court Building, P. O. Box 899, Jefferson City, Missouri 65101.

Subscribed and sworn to this 18th day of February, 1984.

NOTARY PUBLIC

My Commission Expires:
September 20, 1987.

APPENDIX A

83-6568

Supreme Court of Missouri

en banc

STATE OF MISSOURI,)
)
Respondent,)
)
vs.) No. 63436
)
THOMAS HENRY BATTLE,)
)
Appellant.)

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
Division No. 21
Honorable George A. Adolf, Judge

Defendant Thomas Henry Battle was convicted and sentenced to death for the capital murder of an 80-year-old woman. He contends the death sentence violates the Missouri Constitution, his inculpatory statements were unconstitutionally tainted and improperly admitted at trial, the trial court erred in the jury selection process and instructions to the jury, the trial court should have declared a "hung jury" during the penalty phase of the trial, and, lastly, the death sentence should be set aside because it was imposed under the influence of passion and is excessive and disproportionate. We affirm.

Miss Birdie Johnson, 80, lived alone in her St. Louis ground floor apartment. Defendant, 18-years-old at the time of the murder, lived with his parents in a nearby apartment. From time to time

defendant, called "Sweetboy" by Miss Johnson, had performed odd jobs for the elderly lady.

About 2:30 or 3:00 a.m. of July 5, 1980, defendant and Tracy Rowan were in defendant's bedroom "drinking a couple of beers and getting high." Defendant suggested they burglarize Miss Johnson's apartment. They walked over to the targeted apartment and gained entry by climbing atop a fence, ripping the screen from an open kitchen window, and climbing through the window. Defendant led the way and as he went through the kitchen he picked up a twelve-inch butcher knife.

There was substantial evidence from which the jury could find that defendant and his companion raped Miss Johnson, that she was brutally beaten, and the apartment was ransacked for money and valuables. When Rowan turned on a light, defendant announced, in Miss Johnson's presence, that she would have to die because she had seen them. Defendant commenced stabbing the elderly, naked, beaten and ravished woman with the butcher knife. Because the knife kept bending, defendant finally plunged the blade into Miss Johnson's face, just under her left eye. She was still alive, with the knife protruding from her face, "talking and saying short prayers", when defendant and Rowan exited the apartment by way of the kitchen window.

Sometime between 3:00 and 4:00 a.m., Miss Johnson's upstairs neighbor was awakened by knocking sounds coming from downstairs. The neighbor went down to Miss Johnson's apartment and when she heard Miss Johnson calling, broke the front door and entered. The bleeding, aged victim was sitting naked on the floor, with

the butcher knife sticking out of her eye socket. Police and an ambulance were called. Miss Johnson was awake and alert but suffering from shock when she was taken to a hospital. She died at 5:45 a.m. Death was attributed to a combination of the following injuries: severe trauma and bruising of her head, resulting in cranial hemorrhaging; multiple bruises and contusions to her face and body; multiple incisions and lacerations to her chest and back from the knife; eight rib fractures; multiple lacerations of the lung; an injury to the brain from the facial stab wound; shock caused by extreme loss of blood and pooling of two-thirds of the body's total blood supply in the right chest cavity.

We have previously rejected defendant's contention that the death sentence violates the "natural right to life" provision as expressed in Art. I, § 2, Mo. Const. State v. Williams, 652 S.W.2d 102 (Mo. banc 1983); State v. Bolder, 635 S.W.2d 673 (Mo. banc), cert. denied 103 S.Ct. 185 (1982); State v. Newlon, 627 S.W.2d 606 (Mo. banc), cert. denied, 103 S.Ct. 185 (1982). The point is denied.

Defendant avers the admissions and incriminating statements he made on a cassette tape recording and video tape should have been suppressed by the trial court because they resulted from violations by the police of the constitutional guarantees found in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Further, considering the totality of the

circumstances, his admissions and confessions of guilt were coerced and rendered involuntary.

The trial court conducted a lengthy evidentiary hearing on defendant's motion to suppress his incriminating statements.[1] Defendant, in response to leading questions by his attorney, testified that before the cassette and video tape statements were made that he asked the interrogating officers if he had to answer questions and if he could see a lawyer, but the officers ignored his inquiries and continued to question him and make the tapes.

The State's evidence at the suppression hearing was as follows: During the course of the investigation of the murder of Miss Johnson the police received information that a person named Elroy Preston might have been involved. Preston was picked up July 15, 1980, and told officers he, defendant, and Tracy Rowan had been out drinking at the time of the murder. To check Preston's alibi, officers attempted to locate defendant the same day. Defendant was not at home and the officers left a message with his parents for him to call them. Later in the day, defendant telephoned one of the officers and told him he was willing to cooperate and would talk to them the next morning if someone could pick him up.

Between 9:30 and 10:00 a.m. the next morning, July 16, Detective Scaggs drove by defendant's home and picked him up. At

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[1] Defendant's motion to suppress was also directed to statements made prior to the tapings and a statement made the next day. The trial court ordered these statements suppressed.

about 10:30 a.m., Sergeant Riley, Detective Scaggs and two other officers began interviewing defendant in the homicide office.[2] The officers testified that at this time defendant was not a suspect in the murder and was not under arrest. As the officers talked with defendant about Preston's story, he became visibly nervous -- fidgeting and twisting a small towel he had with him. About fifteen minutes after the interview commenced, defendant leaned back in his chair with his legs outstretched. Sergeant Riley noticed that the tread pattern on defendant's tennis shoes looked like a shoeprint found at the murder scene, a photograph of which Sergeant Riley had before him. Riley halted the interview and advised defendant of his Miranda rights. Defendant waived those rights and signed a written consent to be fingerprinted and voluntarily surrendered his tennis shoes.

Approximately an hour after the fingerprinting process had been completed, defendant was returned to the homicide room where Riley told him, correctly, that his palm print and shoes had been found to match a palm print and shoe print discovered in Miss Johnson's apartment after the murder. Defendant at first denied any participation in the murder and claimed he had not been in the victim's house since the previous winter. Shortly thereafter, defendant said: "Man, I've got to tell the truth about this thing." He agreed to make a tape recorded statement. He was given a written Miranda waiver form which he read, initialed each warning, and signed at 12:35 p.m.. At the beginning of the taped

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2 Departmental policy prohibits the interviewing of a person by a single officer.

statement he was again advised of his Miranda rights and again waived these rights. He admitted he and Rowan had broken into Miss Johnson's apartment but stated the murder was committed by his companion without his knowledge or participation. Noting defendant's account of what happened was inconsistent and at times incredible, Sergeant Riley challenged the story in various aspects. When the tape was stopped to change sides, Sergeant Riley told defendant: "You've been a man up to this point. Why don't you be a real man and tell exactly what went down." Defendant agreed to do so and he then confessed to the murder of Miss Johnson.

After the cassette tape statement had been completed, the officers asked defendant if he would give his statement on video tape. He agreed. Enroute to the video taping studio, defendant was given and ate two sandwiches and drank a soft drink. The video tape commenced at 2:17 p.m.. Again, defendant was given and waived his Miranda rights. He repeated his admission that he murdered Miss Johnson.

The officers testified that at no time was defendant threatened, coerced or made any promises regarding his statements. By the time the video tape was completed the defendant had been given and waived his Miranda rights four different times[3] and made

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[3] The following morning, July 17, Rowan, who was in custody, requested investigating officers to come to his cell. After speaking to Rowan, the officers approached defendant's cell to see if he would clarify certain details. Before the officers said anything, defendant told them: "I made a long distance call to God last night . . . and I want to get this thing straight." He again admitted the murder. He was taken back to the homicide room and made further statements regarding details of the crime. The officers' testimony was conflicting as to whether defendant was again Miranda-ized before this statement. In any event, the trial court suppressed defendant's statements of July 17.

no request for an attorney at any time.[4]

In our review of the trial court's determination of defendant's motion to suppress the cassette tape and video tape, the weight of the evidence and credibility of the witnesses are questions for the trial court's resolution and we are not confined to defendant's version of the facts. Furthermore, we are not to disturb the rulings of the trial court where it is supported by substantial evidence. State v. Boggs, 634 S.W.2d 447, 453 (Mo. banc 1982); State v. Baker, 636 S.W.2d 902 (Mo. banc 1982), cert. denied, 103 S.Ct. 834 (1983).

On the record in this case we find no error in the admission of the cassette tape and video tape. The testimony of the officers, the execution of the waiver warning form, the transcripts of both tapes, and defendant's trial testimony clearly show he was given multiple Miranda warnings and repeatedly waived them. On defendant's second prong of attack, that the totality of the circumstances demonstrate coercion, there is substantial evidence to negate this charge. Defendant had completed the eighth grade in school, was no stranger to police questioning, was not denied food, and not threatened or made any promises before making the taped statements. We are of the opinion that the State carried its burden of proving the voluntariness of the defendant's incriminating

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[4] Defendant testified at trial. At no point in his examination did he testify that he asked the officers if he had to answer their questions or asked the officers if he could see or talk to a lawyer before making the tapes. He denied murdering Miss Johnson. He said he, Rowan and Preston entered the apartment but that he left when Miss Johnson awakened. He also testified that Rowan told him Preston killed Miss Johnson and Preston told him that Rowan killed her.

statements by a preponderance of the evidence [State v. Flowers, 592 S.W.2d 167 (Mo. banc 1979)] and the trial court did not abuse its discretion in ruling them voluntary. See, State v. Flenoid, 642 S.W.2d 631 (Mo. banc 1982).

Defendant assigns as error the trial court's striking for cause venireman Fannon, suggesting such action violates the rule of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We recognize that Witherspoon holds that potential jurors cannot be excused for cause merely on the basis of general objections to or religious scruples regarding capital punishment but are of the opinion that defendant's contention overlooks that part of Witherspoon that declares veniremen must be willing to consider all of the penalties provided by law and not be irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might be presented at trial. 391 U.S. at 521-22 n. 20.

We have carefully examined the entire examination of venireman Fannon - by the prosecutor, the defense attorney, and the court. He stated that because of religious beliefs he could not sit in judgment of another man and could never impose the death penalty in any case, regardless of the circumstances. When he equivocated to some extent in voir dire by defendant's attorney, the trial judge asked:

> Court: " . . . [A]re you saying that in no case would you ever consider the death penalty, would you be able to consider it? Are you saying that or are you not saying that?

Fannon: Yeah. I don't think I would. I mean -

Court: There's no case, there's no case in which you would ever consider imposing the death penalty, is that what you're saying?

Fannon: Yeah.

Viewing the testimony of venireman Fannon as a whole, we do not find the trial court abused its broad discretion in concluding this prospective juror would automatically vote against capital punishment regardless of the evidence. State v. Stokes, 638 S.W.2d 715, 722 (Mo. banc 1982), cert. denied, 103 S.Ct. 1263 (1983); State v. Garrett, 627 S.W.2d 635, 642 (Mo. banc), cert. denied, 103 S.Ct. 208 (1982).

Defendant also argues that "Witherspooning" the jury panel and the resulting excusal of seven veniremen who categorically refused to consider the death sentence as a punishment alternative, violated his right to trial by a jury selected from a fair cross-section of the community, citing Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 1770, 20 L.Ed.2d 776 (1975), and Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). This identical point has been previously raised and ruled adversely to defendant. State v. Blair, 638 S.W.2d 739 (Mo. banc 1982), cert. denied, 103 S.Ct. 838 (1983), and cases cited at 752. The point is denied.

Defendant asserts that the aggravating circumstance found by the jury, that the murder of Miss Johnson "was outrageously or wantonly vile, horrible or inhuman in that it involved torture,

or depravity of mind" [§ 565.012.2(7), RSMo 1978 Supp.] is unconstitutionally vague. Similar assignments have been expressly considered and rejected by this Court. State v. LaRette, 648 S.W.2d 96, 102 (Mo. banc 1983); State v. Newlon, 627 S.W.2d 606, 621-23 (Mo. banc), cert. denied, 103 S.Ct. 185 (1982).

Defendant next contends the trial court erred in refusing his tendered instruction in the penalty phase which listed all of the seven statutory mitigating circumstances found in § 565.012.3, RSMo 1980 Supp. The court ruled that three of the mitigating circumstances[5] were not supported by the evidence in the case. Defendant then tendered an amended version of MAI-CR 2d 15.44 instruction which omitted the three paragraphs and the court gave the same. We find no evidence in the record to support the three stricken mitigating circumstances.

After additional evidence and argument at the punishment stage of the trial, the jury retired to consider the matter of punishment at 5:40 p.m. They were given three forms of verdict: a sentence of death, a sentence of life imprisonment, and one stating they were unable to agree upon punishment. Less than two hours later counsel for defendant requested that a "hung jury" be declared by the court and defendant sentenced to life imprisonment. The trial judge denied the request but agreed to call the jury into the courtroom and inquire if further deliberations would

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5 2. Whether the murder of Birdie Johnson was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. Whether Birdie Johnson was a participant in the defendant's conduct or consented to the act.

6. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

be helpful in reaching a verdict as to punishment. The judge indicated that if a majority of the jurors indicated more deliberation would not be helpful, he would declare a "hung jury" on the issue of punishment. The jury was brought in and by a show of hands all of them agreed further deliberations would be helpful. The court at that point offered the jury the choice of returning to the jury room or recessing for dinner and by a show of hands they elected to resume deliberations. The court denied defendant's second request for a mistrial on the issue of punishment forty-five minutes later and a third request at 9:00 p.m. The verdict of death was returned at 9:30 p.m.

Defendant argues that the time consumed by the jury in arriving at the death sentence was "unreasonable" and directs our attention to § 565.006.2, RSMo 1980 Supp., which, inter alia, provides that "If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law . . . . "

We think it is clear that the foregoing statute vests considerable discretion in the trial court, and in our view properly so. In considering the punishment to be meted out in this capital murder case the jury had been instructed they could consider all of the evidence which had been offered in a trial which had consumed five days and three nights. We have recognized that even in non-capital cases the length of time that a jury should be permitted to deliberate is a matter very largely within the discretion of the trial court. State v. Covington, 432 S.W.2d 267, 271-72 (Mo. 1968). We find no abuse of discretion in this case

Defendant's double-barreled assault on the imposition of the death penalty is that the sentence was imposed under the influence of passion and excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 565.014, RSMo 1978, mandates that this Court review the imposition of the death penalty. Our review includes the entire record and transcript and a report prepared by the trial judge. We are obligated to consider the punishment as well as any errors enumerated by way of appeal [§ 565.014.2] and with regard to the sentence shall determine [§ 565.014.3]:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Defendant's charge that the death sentence was the result of passion finds no support in the record. He contends that a photograph of Miss Johnson with the knife protruding from her head evoked an "emotional response" from the jurors and this, coupled with the amount of time they deliberated, "demonstrates that the sentence was 'imposed under the influence of passion.'"

First of all, the photograph was relevant evidence and as stated in State v. Shaw, 636 S.W.2d 667 (Mo. banc), cert. denied, 103 S.Ct. 239 (1982):

> [I]t would be foreign to our concept of criminal jurisprudence to suggest that relevant evidence should be inadmissible merely because it tends to prejudice the defendant. See State v. Wood, 596 S.W.2d 394, 403 (Mo. banc), cert. denied, 449 U.S. 876, 101 S.Ct. 221, 66 L.Ed.2d 98 (1980). Any incriminating evidence is by definition prejudicial.

Id. at 672. The criticized photograph graphically demonstrates the heinous nature of the instant killing and not only corroborates and clarifys testimony of witnesses [State v. Wallace, 504 S.W.2d 67, 72 (Mo. 1973), cert. denied, 419 U.S. 847 (1974)] but also bears on the defendant's intent and deliberation. State v. Ford, 585 S.W.2d 472, 474 (Mo. banc 1979). In the statutory report filed by the trial court, the judge answered "No" to the question "Was there any indication that the jury was influenced by passion, prejudice, or any other arbitrary factor when assessing punishment?" Our review of the entire record leads us to the same conclusion.

Defendant does not question the sufficiency of the evidence to support the jury's finding of the statutory circumstance that the murder of Miss Johnson was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind." Nevertheless, pursuant to the mandate of § 565.014.3(2), we find there is substantial evidence to support the jury's finding of the aggravating circumstance beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Defendant forcibly entered Miss Johnson's apartment for the announced purpose of committing burglary. Just inside, defendant armed himself with a twelve-inch butcher knife even though he

knew the elderly occupant of the apartment lived alone. The 80-year-old victim was raped, beaten, and then repeatedly stabbed and the knife plunged into her face to carry out defendant's declaration that she had to be killed. Despite the brutal and horrendous attack on Miss Johnson she was still alive when defendant fled the apartment. Bleeding internally and externally from multiple wounds, the mortally wounded woman remained conscious until her death several hours later. The testimony of lay and medical witnesses, together with trial exhibits, vividly demonstrate the savage and heinous killing of the aged and defenseless woman. The jury could well find that she had substantial time to contemplate her fate [State v. Blair, 638 S.W.2d 739 (Mo. banc 1982), cert. denied, 103 S.Ct. 838 (1983)] and her slaying was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind.

We turn now to defendant's final contention that the imposition of the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Defendant refers us to capital murder cases in which the death penalty was waived by the State. Death-waived cases are not relevant in our proportionality review. State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982), cert. denied, 103 S.Ct. 770 (1983); State v. Mercer, 618 S.W.2d 1 (Mo. banc), cert. denied, 454 U.S. 933 (1981). Neither are the cases cited by defendant in which the defendant was a mere accomplice or secondary participant in the killing. Contrary to a defendant's argument, we do not

deem State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982), to be applicable to this case. According to defendant's testimony he had completed the eighth grade in school. The trial judge's report shows defendant had completed the tenth grade. There is no evidence that he was a person of subnormal intelligence, had a history of alcohol abuse, or was a weakling and a follower as determined in McIlvoy in reducing the sentence in that case. The record indicates that defendant was of normal intelligence; that it was defendant who formulated and initiated the plan to burglarize Miss Johnson's apartment; that it was defendant who decided that Miss Johnson must die and the active wielder of the murder weapon.

Defendant requested and received a psychiatric examination and then withdrew his notice of mental disease or defect rendering him unfit to proceed. Although the report was not included in the record filed with us, the trial judge's report shows he was not suffering from any mental disease or defect excluding responsibility at the time of the offense or at trial. In the report the trial judge made the following comment regarding the appropriateness of the death sentence in this case:

> I personally do not ever believe in the death penalty. The Supreme Court of the United States has ruled it constitutional. According to my understanding of the law, a jury would not be unreasonable in assessing such punishment under the facts of this case according to the present state of the law.

Defendant was 18 years and 4 months old at the time of the murder. According to the trial judge's report defendant had been committed to the Boonville Training School for Boys in 1978 for

"Juvenile-Assault". Apparent minor offenses in 1979 and 1980 resulted in fines, according to the report.

In his argument on this point defendant lays heavy stress on defendant's age in seeking to avoid the death penalty.[6] Much of the argument calls into question the wisdom of the death penalty. The General Assembly of Missouri has resolved that question against defendant.[7] Throughout his argument defendant ignores the substantial evidence showing his callous indifference to the life of his 80-year-old victim.

We have reviewed the capital cases in which death and life imprisonment have been submitted to the jury under the law effective May 26, 1977, in which the jury agreed on punishment

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[6] In Missouri, the age limit for juvenile court jurisdiction is 16. The defendant, 18 at the time of the murder and 19 at the time of trial, was an "adult". Section 211.021, RSMo 1978.

[7] The legislatures in some states have enacted statutes prohibiting the death penalty sanction in cases involving youthful offenders. See e.g., Cal. Penal Code § 190.5 (West Supp. 1982) (defendant under 18 at time of offense); Conn. Gen. Stat. Ann. § 53(a)-46(a) (West Supp. 1981) (same). Absent such a statute, states are free to apply their death penalty statutes to young offenders, and even juvenile offenders who stand trial as adults, so long as such statutes comport with general eighth amendment standards. See generally, Note, The Death Penalty for Juveniles -- A Constitutional Alternative, 7 J. Juv. Law 54 (1983). The imposition of the death penalty is not cruel and unusual punishment per se simply because the defendant is a minor at the time of the offense. Eddings v. United States, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (defendant 16 at the time of the murder) (sentence reversed and remanded on the grounds that the trial court failed to consider all relevant mitigating circumstances). Our holding is consistent with other state court decisions which have recently affirmed the death penalty in cases involving offenders younger than Battle. See, Ice v. State, No. 81-SC-5-MR, Slip Op. (Ky., Sept. 21, 1983) (defendant 15 at time of offense); Tokman v. State, 435 So.2d 664 (Miss. 1983) (defendant 17 at time of offense, 18 at trial). See also, High v. Zant, 250 Ga. 693, 300 S.E.2d 654 (1983) ("minor at the time of the offense").

and which have been ruled on appeal.[8] Defendant's sentence of death for the murder of Miss Johnson is not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant.

The judgment is affirmed.

William H. Billings, Judge

Rendlen, C.J., Welliver, Higgins, Gunn, and Donnelly, JJ., concur; Blackmar, J., concurs in part and dissents in part in separate opinion filed.

Execution date set for January 6, 1984.

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[8] State v. Davis, 653 S.W.2d 167 (Mo. banc 1983); State v. Doyle Williams, 652 S.W.2d 102 (Mo. banc 1983); State v. Smith 649 S.W.2d 417 (Mo. banc 1983); State v. LaRette, 648 S.W.2d 96 (Mo. banc 1983); State v. Blair, 638 S.W.2d 739 (Mo. banc 1982), cert. denied, 103 S.Ct. 838 (1983); State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), cert. denied, 103 S.Ct. 838 (1983); State v. Stokes, 638 S.W.2d 715 (Mo. banc 1982), cert. denied, 103 S.Ct. 1263 (1983); State v. Baker, 636 S.W.2d 902 (Mo. banc 1982), cert. denied, 103 S.Ct. 834 (1983); State v. Shaw, 636 S.W.2d 667 (Mo. banc), cert. denied, 103 S.Ct. 239 (1982); State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982), cert. denied, 103 S.Ct. 770 (1983); State v. Engleman, 634 S.W.2d 466 (Mo. 1982); State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982); State v. Newlon, 627 S.W.2d 606 (Mo. banc), cert. denied, 103 S.Ct. 185 (1982); State v. Greathouse, 627 S.W.2d 592 (Mo. 1982); State v. Bostic, 625 S.W.2d 128 (Mo. 1981); State v. Thomas, 625 S.W.2d 115 (Mo. 1981); State v. Emerson, 623 S.W.2d 252 (Mo. 1981); State v. Turner, 623 S.W.2d 4 (Mo. banc 1981); State v. Jensen, 621 S.W.2d 263 (Mo. 1981); State v. Mercer, 618 S.W.2d 1 (Mo. banc), cert. denied, 454 U.S. 933 (1981); State v. Baskerville, 616 S.W.2d 839 (Mo. 1981); State v. Mitchell, 611 S.W.2d 223 (Mo. banc 1981); State v. Vicky Williams, 611 S.W.2d 26 (Mo. banc 1981); State v. Royal, 610 S.W.2d 946 (Mo. banc 1981); State v. Borden, 605 S.W.2d 88 (Mo. banc 1980); State v. Downs, 593 S.W.2d 535 (Mo. 1980); State v. Ernest Williams, ___ S.W.2d ___ (Mo.App. 1983); State v. Coleman, ___ S.W.2d ___ (Mo.App. 1983); State v. Zeitvogel, 655 S.W.2d 678 (Mo.App. 1983); State v. Martin, 651 S.W.2d 645 (Mo.App. 1983); State v. Scott, 651 S.W.2d 199 (Mo.App. 1983); and State v. Salkil, 649 S.W.2d 509 (Mo.App. 1983).

Supreme Court of Missouri

en banc

STATE OF MISSOURI, Respondent, vs. THOMAS HENRY BATTLE, Appellant.	)	No. 63436

OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in all parts of the principal opinion relating to the affirmance of the conviction. I believe, however, that the death sentence should be set aside. Section 565.014.3(3), RSMo 1978, enjoins us to consider "the defendant" in determining whether the sentence of death is excessive or disproportionate. The present defendant was 18 years old at the time the offense was committed. The principal opinion observes that the legislature imposed no restriction on the age of a person who could be executed. This Court still has its reviewing responsibility and is obliged to substitute its decision for that of the jury, if its assessment of the statutory factors governing sentencing indicates that this action is appropriate.

The history of capital punishment in Missouri shows that persons who were under the age of 20 at the time of commission of the offense have seldom been sentenced to death, or executed.

Of the cases decided under the new capital punishment law which are appropriate for comparison, four involve offenders age 19 or younger. These are: State v. Baskerville, 616 S.W.2d 839 (Mo. 1981); State v. Greathouse, 627 S.W.2d 592 (Mo. 1982); State v. Scott, 651 S.W.2d 199 (Mo. App. 1983); and State v. Blair, 638 S.W.2d 739 (Mo. banc 1982). In the first three the jury declined to assess the death penalty.

Baskerville involved a triple murder in the course of a robbery. The defendant was 19 years of age at the time the offense was committed. The facts as set out in Judge Seiler's Concurring Opinion were shocking and included the wanton killing of one person to obtain a gun, of a second because she was a witness, and of a seven year old boy without apparent reason.

Scott involved a defendant aged 16 years. The facts bear a remarkable similarity to the present case, involving multiple stab wounds, with the additional fact that a second person, who did not die, was repeatedly stabbed.

Greathouse involved the use of an axe followed by multiple gunshots inflicted by a 17-year old boy against his uncle.

There is no precise formula for comparison of horrors, but I am unable to see that the offenses involved in those cases were any less shocking or repulsive than what is involved in the case now before us.

Only in Blair was the death sentence imposed on a teenaged offender. The 18-year old defendant in that case had already served a term in the penitentiary, and had another stretch in jail. He undertook to kill a witness to a rape charged against a fellow prisoner, for a cash payment of several thousand

dollars, and stalked his victim for several days. The record presented elements of willfulness, deliberation, and killing for pure gain which are not found in the present cases.

History shows that 35 persons were executed in the Missouri gas chamber following state convictions, prior to the invalidation of the previous death penalty statutes pursuant to Furman v. Georgia, 408 U.S. 238 (1972). Only two of the 35 were under the age of 18 at the time of the offense. See State v. Lyles, 353 Mo. 930, 185 S.W.2d 642 (1945); and State v. Anderson, 386 S.W.2d 225 (Mo. banc 1963). Without lengthening this opinion by details it is sufficient to say that both cases involved willful killings incident to robbery, in which the defendants abused their victims prior to killing and also severely wounded other persons who might well have died.

One of the most aggravated murders in our history is that of Bobby Franks by Richard Loeb and Nathan Leopold. The victim was abducted and brutally murdered by use of a chisel, while a ransom note was in circulation and the kidnappers continued their efforts to collect the ransom knowing that he was dead. The defendants retained Clarence Darrow and entered pleas of guilty. Sentencing fell to Judge John R. Caverly, Chief Justice of the Criminal Court of Cook County, Illinois. The Judge paid little attention to Darrow's psychological arguments but nevertheless decided not to impose the death penalty, explaining his reasoning as follows:[1]

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[1] Chicago Tribune, Sept. 11, 1924, p. 2. See also 15 Journal of Criminal Law and Criminology, 393 (1925).

> It would have been the path of least resistance to impose the extreme penalty of the law. In choosing imprisonment instead of death, the Court is moved chiefly by the consideration of the age of the defendants, boys of 18 and 19 years. It is not for the Court to say that he will not in any case enforce capital punishment as an alternative, but the Court believes that it is within his province to decline to impose the sentence of death on persons who are not of full age.
>
> This determination appears to be in accordance with the progress of criminal law all over the world and with the dictates of enlightened humanity. More than that, it seems to be in accordance with the precedents hitherto observed in this state. The records of Illinois show only two cases of minors who were put to death by legal process--to which number the Court does not feel inclined to make an addition.

Perhaps this view from a time when the death penalty was much more often imposed than it is now will furnish perspective. History tells us that Loeb was killed in a prison incident in the 1930's, while Leopold served many years. After he was released on parole, he led a useful life.

Based on the above comparisons I do not believe that the law requires the life of this young man. In so stating I do not minimize the enormity of his guilt or the horrible details of the offense, but do urge youth as a proper factor for consideration.

I do have reservations as to whether there is compliance with the standards of Godfrey v. Georgia, 446 U.S. 420 (1980). The defendant apparently decided to kill the elderly victim after he and his companion had raped her, in order to prevent identification, but only the "outrageously vile" aggravated

circumstance was submitted to the jury. I am not persuaded that the stab wounds were inflicted with torture in mind. The defendant rather set out to kill but found that his weapon was inadequate, except when a vital spot was located. But Godfrey has always seemed confusing to me and the Supreme Court appears to have retreated from it in recent years. I rather rest my conclusion on comparisons and on the age of the offender.

The defendant has argued the incongruity of allowing a death sentence to stand while his accomplice goes free through an acquittal. If this defendant is in fact executed, future generations will sense irony in the situation, but inconsistent verdicts are to be expected so long as we have individual determination of guilt with trial by jury and free severance, which are established parts of our criminal law and procedure. The incongruity may be corrected by the Governor, if so minded. The statute does not authorize the courts to afford mitigation on account of these circumstances. There is no basis for comparison of punishment when the jury determines that one alleged participant was not guilty of any offense and cannot be punished at all.

The case should be remanded with directions to resentence the defendant to life imprisonment without probation or parole for 50 years.

CHARLES B. BLACKMAR, Judge

APPENDIX B

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

December 20, 1983

Mr. Robert C. Babione
10 North Tucker Blvd.
9 Mezz.
St. Louis, MO 63101

Thomas Henry Battle

In re: State of Missouri vs. Leonard Marvin Laws
No. 64421

Dear Mr. Babione:

This is to advise that the Court this day entered the following order in the above-entitled cause:

App.'s motion for rehearing overruled.

Very truly yours,

Thomas F. Simon
Clerk

cc: Attorney General

RECEIVED DEC 21 1983

721-6040

Smith Allen — extension.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution: Articles VI, VIII, and XIV. Statutory provisions: 565.008 (1) (R.S.Mo. 1978), 565.012 R.S.Mo. Supp. 1982, and 565.006 R.S.Mo. Supp. 1982. See Appendix D.

APPENDIX C

Section 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against is validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX D

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, when district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law shich shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of

such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS

565.008 (1) (R.S.Mo. 1978)

Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

565.006 R.S.Mo. Supp. 1982

1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. In each jury capital murder case, the court shall not give instructions on any lesser included offense which could not be supported by the evidence presented in the case.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge, at which time the only issue shall be the determination of the punishment to be imposed. In

such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty, or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury approrpiate instructions, and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

565.012 R.S.Mo. Supp. 1982

1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence;

(2) Any of the statutory mitigating circumstance enumerated in subsection 3 which may be supported by the evidence;

(3) Any mitigating or aggravating circumstances otherwise authorized by law; and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful confinement;

(10) The capital murder was committed for the prupose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The capital murder was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate the felony of rape or forcible rape or the felony of sodomy or forcible sodomy;

(12) The capital murder was committed by the defendant for the purpose of preventing the person killed from testifying in any judicial proceeding.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional distrubance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

INDEX TO APPENDIX E

Questions Presented

1. Testimony of venire people as to religious beliefs, strikes for cause, and objection thereto:

   a. Transcript:

James Fannon:	T. 24-28
Mary Kelso:	T. 69
Katie Ingram:	T. 78-81
Richard McCarthy:	T. 81
Mary Ray:	T. 82-91
Cleo Morrison:	T. 105
Sylvia Van Lopik:	T. 115

2. Motion to Suppress Statements: L.F. 233-235.

3. Testimony concerning defendant's request for an attorney: T. 245

4. Court's overruling Motion to Suppress: T. 371.

5. Defense instruction C: L.F. 94, 95.

6. Trial Court's refusal to give instruction C: T. 1022, and defense attorney's objection thereto.

7. Court submitted instruction #33 on mitigating circumstances: L.F. 85.

8. Evidence in transcript supporting defense instruction C: T. 850-59, T. 884, T. 1035-1038.

(Proceedings were then resumed within the hearing of the jury panel as follows:)

MR. BROWN: Then after breaking in, both men raped the woman and then she was killed. She was stabbed and beaten and she was found alive, taken to the hospital, died two hours later at the hospital. Have any of you heard anything at all about this incident or anything about it? Okay. I take it that none of you do.

All right. Then as you've heard, the charge in this case is capital murder, and in this case the State is going to be seeking the death penalty. So my question to each of you at this time is: If, during the trial of this case, the facts and circumstances that come forth as evidence are such that, under the law that the Judge will be giving you, that the jury could consider the death penalty, would you as a juror consider the death penalty? Mr. Fannon?

VENIREMAN FANNON: (Indicated.)

MR. BROWN: You're going to have to say yes or no, sir. The court reporter has to take down what is said and can't take down shakes of the head. Were you shaking your head no, is that correct?

VENIREMAN FANNON: Right.

MR. BROWN: Do you feel that because of some moral or religious or conscientious reason, that you feel you could never impose the death penalty in any case?

VENIREMAN FANNON: Be more religious than anything. You know, the Bible says man does not judge man.

MR. BROWN: Okay. So, if I understand it, because of your religious principles, you feel --

VENIREMAN FANNON: Religious, yeah.

MR. BROWN: -- you feel that you should not sit in judgment on another man?

VENIREMAN FANNON: Right.

MR. BROWN: You feel you could never impose the death penalty in any case, regardless of the circumstances?

VENIREMAN FANNON: That's right.

MR. BROWN: Okay. Thank you, sir. Are there any of the other five of you that fall in that category, that feel, because of any type of religious or moral or conscientious beliefs or scruples, that you feel, regardless of the circumstances, you could never impose the death penalty? Seeing no response, I'm assuming you can.

Just one other question. Do any of you feel that because of any reservations about capital punishment that you might have, that that might prevent you from rendering an impartial verdict as to guilt or innocence? Okay. The distinction there is not whether you could impose the death penalty under any circumstances at all, but whether, just because of some reservations that you may or may not have about capital punishment, that you feel that those reservations, although you'd be able

to overcome them in some cases, might in some cases prevent you from rendering an impartial verdict as to guilty or innocence. Okay. Again, I see no hands.

Judge, I have no other questions of these six jurors at this time.

THE COURT: Very well. Mr. Fredman, you may inquire.

MR. FREDMAN: Thank you, Your Honor.

MR. FREDMAN: Good morning, ladies and gentlemen. As I've been previously introduced, my name is Mark Fredman. I'm the lawyer for defendant Thomas Battle who is here seated in the courtroom today. I practice law in the City of St. Louis. I'm not affiliated with the State's Attorney's Office or the Public Defender's Office. I'm a private lawyer and I practice law in the City of St. Louis, and not only work with myself, but I also work with a few other lawyers and I'm going to tell you their names at this point to just see if any of those names ring a bell. I work with my cousin whose name is Richard Fredman, another lawyer named Randy Kopf, and a third lawyer by the name of Robert Terry Deep, we call him Terry. Do any of you know those associates? Okay. I take it by your silence you do not.

We have broken up -- As you can see, we've broken you up from the main group and we will be doing the same thing with the other people and it's basically for a reason. And one of the reasons is so that we can question you about specific

areas. The Judge has already talked with you about the sequestration area and Mr. Brown had an opportunity to ask you a couple of questions about the publicity aspect and also about some of your views on the death penalty. I will have a chance to ask you more questions later, as will Mr. Brown, about a wide range of other things. But I would also like to make it known to you that we feel the same way, Thomas and I feel the same way. If there's anything you wish to volunteer, please let us know. We're going to have to ask you some questions that sound like we're prying, and I don't want to make it seem like we're prying, but it's a very important moment in Thomas' life. I'm sure you understand that. It's a very important, solemn obligation that you have.

Now, Mr. Fannon has already stated that he has some reservations about the death penalty, and I don't want to pick on you, but I want to pick on you a little bit. Okay. Let me ask you this: Is there any conceivable set of circumstances that might arise, either a vicious or brutal murder, or use your imagination, is there any set of circumstances where you think that it might be appropriate?

VENIREMAN FANNON: I would have to see it myself, but that's the only way.

THE COURT: I didn't hear you, what?

VENIREMAN FANNON: I'd have to see it.

MR. FREDMAN: You'd have to be an eyewitness?

VENIREMAN FANNON: Right.

MR. FREDMAN: The law in the State of Missouri is such that -- Do you think you could -- The law in the State of Missouri is basically this: That there is a capital murder statute and that capital murder statute provides for two penalties. One is life imprisonment without the possibility of probation and parole for at least fifty years, and the other portion is death. So those are the two possible verdicts. If the Court -- If you envision yourself in one of those situations that you're using in your mind as you're an eye-witness to, and if the Court instructed you that that's what the two possible punishments could be, do you think you could follow the instructions and apply the law of the State of Missouri?

VENIREMAN FANNON: Yeah.

MR. FREDMAN: You think you could?

VENIREMAN FANNON: Yeah.

MR. FREDMAN: Okay. Thank you. Now, the other thing I'd like to mention, kind of right off the bat, we're doing this -- we're talking about punishment right at the very beginning. And I want you all to understand that we're doing that for a reason, as I've told you before, to try and get these ideas out of the way first, then we'll bring the other panel back, but not by any stretch of the imagination do I want you to get the impression that that's all we're talking about. It's not

or anything with any of the other jurors. Don't even talk about the weather.

o0o

(After the six members of the jury panel left the courtroom, the following proceedings took place:)

MR. FREDMAN: Let me guess ---

MR. BROWN: Your Honor, at this time the State would move that Juror 157, Mary Kelso, be excused for cause.

THE COURT: All right. What's the defendant's position on the State's motion?

MR. FREDMAN: The defendant would object to that, Your Honor. I think that by excluding people like Mary Kelso, that it denies Thomas Battle the right to have a trial by a cross section of the community, that is, people that would -- people that are opposed to the death penalty as well as people that may be in favor of it.

THE COURT: Well, as I said before, it's not my duty to agree or disagree with the law, it's merely to follow it. And so I will sustain the State's motion to strike Juror No. 157, Mary Kelso, for cause and I'm doing it based upon Witherspoon vs. Illinois, 391 U.S. 510.

o0o

(After the six members of the jury panel were seated, the following proceedings took place:)

THE COURT: All right. I'll address the next six of you.

I'm wondering is have any of you formed any type of opinion about the case or are you forming one now merely because it has been in the radio or has been on -- in the newspapers? Whether or not it has, I'm not exactly sure. But has anyone formed any type of opinion that way? I guess not.

When we started talking about this death penalty question, I'm sure that that kind of conjures up all sorts of impressions in your mind. I want to make it very clear that we are not conceding anything, that we're talking about these questions in a group of six, but that that's not the only issue in this case.

The first, the paramount issue in this particular case is whether or not the State can prove Thomas Battle guilty beyond a reasonable doubt, and this other question about the death penalty or whatever other punishment is involved in a capital murder won't even be reached until that first question is reached by the jury.

Now, let me get this right, Mrs. Ingram and Mr. McCarthy both have some distinct views, and I'm going to pick on you for a while, okay, and please bear with me. You have some distinct views about that and you made some fairly certain statements. I'd like to approach it from a different approach. I would like you both to think about the other side of the coin. Is there any way that, if you conjured up some particular heinous crime or something in your mind, that you might consider

the death penalty? I know you don't know anything about this case or you don't know anything about something else, but think about that for a second and is there any way you might consider that? Mr. McCarthy?

VENIREMAN MC CARTHY: I'm sure I wouldn't.

MR. FREDMAN: Okay. Mrs. Ingram?

VENIREWOMAN INGRAM: I'm sure of it.

MR. FREDMAN: Okay. Does anybody feel that merely because the State has announced its intention to seek the death penalty, that that's any evidence that Thomas Battle is guilty of anything? Okay.

Does anybody feel that retribution, that is the general concept of an eye for an eye, tooth for a tooth, that sort of thing, is the primary reason why we punish? I take it by your silence that you do not.

The range of punishment in this particular case, if the jury found the defendant guilty beyond a reasonable doubt, is basically two things. It's life imprisonment for a period of fifty years, no probation, no parole, or the death penalty. And that's a decision that the members of the jury will have to make if they come to that, if it gets that far. And I assure you that and I think you understand that we're not conceding anything, we're just discussing it at this point.

Also during that phase of the trial there will be mitigating circumstances that may be entered into evidence and there may

be aggravating circumstances that may be entered into evidence to assist the jury in coming to that conclusion. Now, Mr. McCarthy or Mrs. Ingram, with that in mind, with what may be mitigating circumstances in evidence or aggravating circumstances in evidence, do you think that you would change your mind with respect to being able to follow the law as Judge Adolf would give it to you?

VENIREMAN MC CARTHY: You mean as far as the death penalty?

MR. FREDMAN: As far as the death penalty.

VENIREMAN MC CARTHY: I don't think so. I'm sure I wouldn't.

MR. FREDMAN: You're not sure you would?

VENIREMAN MC CARTHY: No, I am sure.

MR. FREDMAN: I'm sorry, I misunderstood.

VENIREMAN MC CARTHY: I just --

MR. FREDMAN: Okay. Mrs. Ingram?

VENIREWOMAN INGRAM: I'm sure I wouldn't.

MR. FREDMAN: Okay. Is there anybody else who feels for any reason that they will not be able to properly assess the punishment as specified in this particular case if we get to that particular stage, that is, that you can't consider all the ranges of punishment? I take it by your silence you all can. I thank you for your time.

THE COURT: All right. Mrs. Ingram, are you saying that you could never vote in favor of the death penalty, no matter

what the circumstances were?

VENIREWOMAN INGRAM: Yes.

THE COURT: Mr. McCarthy, are you saying that you could never vote in favor of the death penalty, no matter what the circumstances were?

VENIREMAN MC CARTHY: Yes, Your Honor.

THE COURT: All right. Thank you for your answers. And I'll excuse this group of jurors and when you go back to Division 19 where you're all sitting, I don't want you to discuss anything with any of the other jurors, including the weather. Don't discuss anything period. You're now excused to go back.

oOo

(After the six members of the jury panel left the courtroom, the following proceedings took place:)

MR. BROWN: Your Honor, at this time the State would move to strike Juror No. 120, Katie Ingram, and Juror No. 189, Richard Mc Carthy, for cause.

THE COURT: All right. Does the defendant oppose the State's motion?

MR. FREDMAN: Yes, Your Honor, for the same reasons I expressed before.

THE COURT: All right. I'll make the same ruling and the State's motion to strike Jurors 120, Ingram, and 189, McCarthy, will be sustained.

oOo

(After the six members of the jury panel were seated, the following proceedings took place:)

THE COURT: It's a hardship to serve as a juror, I understand that. There's an additional hardship in this case and that is that beginning tomorrow night, you won't go home, in other words, you'll spend the night at a motel or hotel. You'll probably spend about three nights, probably Tuesday, Wednesday and Thursday at a motel. You can have a single room. You're not required to be in a room with anyone else, due to a lot of reasons. You can have a roommate if you want one. I'm going to ask you now whether any of you feel that this would impose a particular hardship on you, and let me just tell you -- this is not meant to be a threat, it's just meant to be a fact -- I don't excuse very many people. But if any of you think that would impose a particular hardship on you, you should raise your hand now and I'll listen to what you have to say. Is there anyone who feels that way? All right. You're Mary Ray, is that right?

VENIREWOMAN RAY: Yes, sir.

THE COURT: Why don't you step up.

(The following proceedings took place at the bench outside the hearing of the jury panel:)

THE COURT: What hardship do you think it would impose on you?

VENIREWOMAN RAY: My belief, I just don't want to

pass judgment.

THE COURT: All right. Anything else?

VENIREWOMAN RAY: No, sir.

THE COURT: Okay. Thank you for the information. You can sit down again.

(Venirewoman Ray returned to her seat.)

THE COURT: All right. Mr. Harney, you want to come up?

(Venireman Harney approached the bench.)

VENIREMAN HARNEY: Okay. Your Honor, I've got -- holding down two positions. I'm working as a City employee and also working as a security officer in the evening, and by being a City employee, I'm not paid for being on jury duty and I also need my secondary job to support my family.

THE COURT: All right. What hours do you work as a security guard?

VENIREMAN HARNEY: It varies. This week I'll be working Tuesday and Wednesday evening.

THE COURT: All right. From what hours?

VENIREMAN HARNEY: It would be 5:30 to 9:45.

THE COURT: Who are you employed by?

VENIREMAN HARNEY: Famous-Barr as a security guard.

THE COURT: Any question on that, Mr. Brown?

MR. BROWN: I don't have any question.

THE COURT: Mr. Fredman?

MR. FREDMAN: Do you feel there's no way that you

could work out that situation at Famous and Barr, in other words, have somebody else cover for you and you take time some other time, or you're just going to be out the money if you can't?

VENIREMAN HARNEY: I would be out the money.

MR. FREDMAN: And you don't get paid as a City employee

VENIREMAN HARNEY: No, sir, I don't, not being on jury duty.

MR. FREDMAN: Do you have a family?

VENIREMAN HARNEY: I have a wife.

MR. FREDMAN: Do you have any children?

VENIREMAN HARNEY: No, sir.

THE COURT: Does she work?

VENIREMAN HARNEY: Yes, sir, she does.

THE COURT: All right. Where does she work?

VENIREMAN HARNEY: GFC Loan Company.

THE COURT: What does she do there?

VENIREMAN HARNEY: Administrative Assistant.

THE COURT: How long has she been there?

VENIREMAN HARNEY: About four years.

THE COURT: All right. Thank you for the information.

(Venireman Harney returned to his seat and the proceedings were resumed within the hearing of the jury panel as follows:)

THE COURT: All right. Mr. Brown, you may inquire.

MR. BROWN: Thank you, Your Honor.

MR. BROWN: Ladies and gentlemen, again my name is Mark Brown. I'm an Assistant Circuit Attorney. That means I'm the prosecutor in the case. I'll be -- Mr. Fredman and I will both be asking you questions and at the moment we're just going to be asking six of you some rather narrow and specific questions. Later on you'll all be brought in in a larger group and be asked questions on a whole range of topics. The first thing I want to say to you is there are no right or wrong answers to these questions, there are only honest answers. So don't be thinking well, what is he trying to get at, or whatever. We just want to get your feelings and your beliefs and again there are no right or wrong answers to any of these questions.

And the reason I'm emphasizing the importance of the honesty in answering questions is this: As you know, the defendant is charged in this case with capital murder and the State is going to be seeking the death penalty in this case, and that is why I am talking about the importance of honesty in your answers. Assuming you're one of the jurors that sits on this case, you will probably never perform any other civic function or duty more important than sitting on this particular case.

Now, I can't go into any great detail at this point, but I can tell you something briefly about the facts of the case

just to try to find out if any of you know anything about it or have heard anything about it, other than what you'd be hearing from the witness stand.

Now, the State is charging that on July 5th of 1980, July 5th of last year, that in the early morning hours, two people, one of them being this defendant, broke into the home of an eighty year old woman named Birdie Johnson at 4315 Lee in the City of St. Louis. The State is alleging that once they got in, they both raped her and then beat her and stabbed her. She lived for two hours before dying in the hospital. Have any of you heard anything at all about this case? Okay.

All right. Since none of you have heard anything about it, let me go on then to another area, and that is the area concerning punishment. Now, assuming you find the defendant guilty as charged with capital murder, you would then have the duty of returning a punishment. The punishment, you would have one of two choices. It would either be death or imprisonment for fifty years without probation or parole or pardon. And so what I'm -- The purpose of my question is to try and determine if any of you have any type of religious or moral or philosophical or ethical feelings or beliefs or scruples that you feel would either interfere with your making a determination initially as to guilt or innocence, or which would prevent you from considering imposing the death penalty. And more specifically, my question is this: If, during the trial

of this case, the facts and circumstances that come forth as evidence are such that under the law, the law that the Judge would give you, the jury could consider the death penalty, would you, as a juror, consider the death penalty? Are there any of you here who feel you would not consider the death penalty? Okay. Miss or Mrs. Ray?

VENIREWOMAN RAY: Mrs. Ray.

MR. BROWN: Okay. And what is your situation as far as that?

VENIREWOMAN RAY: My religious belief.

MR. BROWN: Would it be a correct statement then that under no circumstances and under no set of facts that could possibly be brought forth, you could never consider returning a verdict of death?

VENIREWOMAN RAY: No, sir.

MR. BROWN: Regardless of any type of facts or situations brought forth, you could never in any case --

VENIREWOMAN RAY: No, sir.

MR. BROWN: -- consider the death penalty? Okay. Thank you, Mrs. Ray. Are there any others of you who feel the same as this lady, that regardless of the facts, that you could never consider imposing the death penalty?

I have no other questions, Your Honor.

THE COURT: All right. Mr. Predman, you may ask any questions that we've decided upon.

MR. FREDMAN: Thank you, Your Honor.

MR. FREDMAN: Good morning, ladies and gentlemen. My name is Mark Fredman and I'm an attorney and I represent Thomas Battle in this particular case. We have, by prior agreement, arranged to ask a limited number of questions to you on the topics that both the Judge and Mr. Brown have already talked to you about. It's now my opportunity to talk with you a little bit.

Both right now and when we ask you some questions later, it's certainly not my intent to pry, but I think you can understand, from the gist of what's going on so far, it's a pretty serious thing and it's very serious for Thomas, and we would appreciate whatever candor that you can muster in your responses, and I know that you've all been responsive thus far. One of the things I'm concerned about is that because right off the bat we're talking about the death penalty, that you kind of like make a leap of fate and one thing that I want to make it very clear is that number one, we're not conceding anything, that the question of the death penalty will never even be reached unless the paramount or the first question that's to be decided by the jury in this particular case is whether or not the State could prove their case beyond a reasonable doubt.

Now, with that in mind, does anybody feel that merely because the State of Missouri has decided to ask for the death

penalty in this case, that the defendant must be guilty because they're asking for it? I take it by your silence no one feels that way.

Now, does anybody feel -- Mrs. Ray felt that she could not impose the death penalty, I believe she said for religious or personal reasons. Does anybody feel the other way, that is, does anybody feel that if the evidence is there and if they find enough evidence to convict beyond a reasonable doubt of capital murder, then automatically they must impose the death penalty? Does anybody feel that way?

I will -- For your information, I will tell you that the range of punishment on this particular charge would be -- Well, basically there are two, the death penalty, which the State is seeking in this particular case, or the other punishment is life in the penitentiary without the possibility of probation or parole or pardon for at least fifty years. So that's the punishment range we're talking about. And I assume from your silence that none of you, if you got to that question, would automatically exclude the possibility of life imprisonment, is that true? I take it by your silence and the shaking of your heads that you can consider the entire range of punishment in this case.

Did anyone hear anything about this particular case or read about it in the newspaper or anything like that prior to coming to court today? No one heard anything about this

particular case? No one has formed any opinions one way or the other?

Thank you, Your Honor. That's all I have.

THE COURT: Very well, Mr. Fredman.

Mrs. Ray, are you telling us that no matter what the facts were, you could never consider the death penalty in any case?

VENIREWOMAN RAY: No, sir.

THE COURT: Is that what you're saying?

VENIREWOMAN RAY: Yes.

THE COURT: All right. I'll excuse this group of jurors to go back with the others and don't talk with those other jurors about anything including the weather. You're not to talk to the other jurors about anything. You're now excused to go back. Let me ask you this: Can you find your way back without the sheriff's deputies taking you there? There are deputies back there that will give you further instructions when you get there. I'll let you go on your own.

o0o

(After the six members of the jury panel left the courtroom, the following proceedings took place:)

MR. BROWN: Judge, the State at this time would move to strike for cause Juror 242, Mary Ray.

THE COURT: Defendant's position, Mr. Fredman?

MR. FREDMAN: Same position, Your Honor.

THE COURT: All right. You object for the reasons

you've previously stated when jurors were moved to be stricken for cause by the State for the death penalty question?

MR. FREDMAN: Yes, sir.

THE COURT: The death penalty issue. I'll overrule your objection and sustain the State's motion to strike Juror No. 242, Mary Ray, for cause.

MR. BROWN: Judge, I think we should have a discussion then as to Juror 717, Michael Harney, who indicated that he felt that it would be an imposition for him to serve on a sequestered jury because of his financial situation.

THE COURT: All right. What's the State's position, if any, on the matter?

MR. BROWN: Judge, I can see how this juror certainly is qualified to serve on a jury and may well be qualified to serve on another jury here sometime during the week. I think that because of what he said, it would be a financial imposition for him to lose the income and that might distract from his attention here during the course of the trial.

THE COURT: What's the defendant's position, if any, on this issue involving Juror Harney?

MR. FREDMAN: I have no objection to striking him for cause. I think it would be a hardship for him. I didn't realize you didn't get paid when you worked for the City.

THE COURT: Well, both sides are saying they don't mind if he's stricken, is that it?

MR. BROWN: Judge, the State would move to strike her for cause because of the death penalty question.

THE COURT: Defendant objects, is that right?

MR. FREDMAN: Yes, sir.

THE COURT: For the same reasons --

MR. FREDMAN: Yes, sir.

THE COURT: -- previously given, and they will be overruled and I'll sustain the State's motion to strike Juror Morrison for cause.

Since there are fourteen jurors left to be examined, we'll bring one additional one in and make it seven this time.

oOo

(After the seven members of the jury panel were seated the following proceedings took place:)

THE COURT: All right. I'll address myself to this group of jury panel members. It's a hardship to be a juror, I understand it. There's an additional hardship in this case and that is that starting tomorrow night you'll be in a hotel and you'll probably be there for three nights while this case is going on. And you can have a single room. You don't have to room with anyone else, or you can have a roommate if you want one. I don't excuse very many people from serving because of hardships, but if anyone feels it's a particular hardship, you should raise your hand now and we'll hear what you have to say about it.

feel that it's not my duty to judge someone.

THE COURT: All right. Let me ask you this next question then. I want to make sure I understood what you said. Are you saying that no matter what the facts are, you could never consider imposing the death penalty in any case?

VENIREWOMAN VAN LOPIK: No.

THE COURT: Is that what you're saying?

VENIREWOMAN VAN LOPIK: That's what I'm saying. I don't think I could impose that, no.

THE COURT: All right. I'll excuse this group to go back with the other jurors. Don't discuss anything with the other jurors and don't even discuss the weather. I'm now going to let you find your way back to Division 19 on your own while we call the next group in. If you think that will cause you any trouble, let me know. You're excused.

oOo

(After the seven members of the jury panel left the courtroom, the following proceedings took place:)

MR. BROWN: Your Honor, at this time the State would move, for cause, to strike Juror 301, Sylvia Van Lopik, on the death penalty question.

MR. FREDMAN: And the defendant's position is we would object for those same reasons we objected before.

THE COURT: All right. I'll sustain the State's motion to strike Juror No. 301, Sylvia Van Lopik, for cause.

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

FILED
AUG 15 1980
JOSEPH P. RODDY
CLERK, CIRCUIT COURT

IN THE CIRCUIT COURT IN AND FOR THE CITY OF ST. LOUIS

STATE OF MISSOURI

STATE OF MISSOURI,

Plaintiff,

v.

THOMAS BATTLE,

Defendant.

Cause No. 80-2563

Division No.

MOTION TO SUPPRESS STATEMENTS

Comes now, Kevin C. Curran, Attorney for Defendant, and moves the Court to suppress all alleged statements, oral, written, video-taped or otherwise recorded, which the State intends to use in evidence against the defendant.

A. Said statement was not voluntary in that:

1. Defendant was not presented before a magistrate "as soon as practicable," and said statement was obtained prior to presentation before a magistrate, and a lawyer was not afforded him prior to or during said interrogation.

2. The length and nature of defendant's custody, and the duration and nature of defendant's interrogation and the conditions under which it was conducted, were inherently coercive as applied to a person of defendant's education, background and physical and mental condition at the time such interrogation occurred.

3. Defendant was subjected to mental, physical and psychological duress during said interrogation.

4. Defendant, a person of limited education, was induced to make alleged statements by averments and promises of the arresting officers, either explicit or implied, and said promises were ones of leniency and of a desire to help the defendant.

B. Said statement was made without the defendant first being advised of his constitutional rights, to wit:

1. Defendant was not advised in clear and unequivocal terms of his right to remain silent prior to his interrogation.

2. The defendant was not advised that anything that he said could and would be used against him in a court of law.

3. The defendant was not advised of his right to consult with a lawyer and to have a lawyer present with him during the interrogation.

4. Defendant was not advised that a lawyer would be appointed for him if he was indigent.

5. Defendant did not waive his right to remain silent, or his right to counsel, or his right to have counsel appointed for him.

6. The interrogation by said police officers did not cease when defendant indicated that he wished to remain silent, and that he desired to have appointed counsel present on his behalf at said interrogation.

All of the matters herein mentioned were in violation of the constitutional rights of the defendant under the Fifth Amendment and Due Process Clause of the Fourteenth Amendment of the United States Constitution; and under Article I, Section 19, and Article I, Section 10 of the Missouri Constitution.

C. Said statement was the direct result of an unlawful arrest in that:

1. The arrest was made without warrant and without authority.

2. The defendant did not violate any law, either misdemeanor or felony, in the presence of the officers which would warrant the arrest.

3. The arresting officer had no probable cause or reasonable grounds to believe that the defendant had committed a felony.

4. Said confession was thereby obtained in violation of Article I, Section 15 of the Missouri Constitution, and of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

K C Curran

KEVIN C. CURRAN
Attorney for Defendant

Copy of the above motion served on the Circuit Attorney this 15 day of August, 1980.

K C Curran

Attorney for Defendant

Q Okay. I mean between the time that you got there and the time that you made the cassette tape, it's your testimony you asked to call your father, right?

A Yes, sir.

Q Did they let you call your father between that period of time?

A No, sir.

Q Okay. Did you -- From the time that you got there to the time that you made the cassette tape, did you ask for a lawyer?

A Well, I asked the officers did I have to answer the questions and I asked them did I -- could I see a lawyer.

Q Okay. And when you asked them did you have to answer these questions, did they continue to ask you questions after that?

A Yes, sir.

Q And when you asked them if you could talk with a lawyer, did they continue to ask you questions after that?

A Yes, sir.

Q And did they make the tape cassette after that?

A Yes, sir.

Q And they made the video tape after that?

A Yes, sir.

Q And before you made the cassette tape and before you made the video tape, did they confront you with accusations about your being in the apartment by way of palm prints and shoe prints?

A Yes, sir.

rights and make a statement?" You've heard from those -- from the defendant's own mouth, from those two tape statements, him saying, "Yes, I'm willing to give up those rights and make a statement."

THE COURT: All right. Is there any -- Mr. Brown, is there any language in the cassette statements, on either the first or second side, about the oh God statement?

MR. BROWN: Not in the cassette statement.

THE COURT: What about the video tape statement?

MR. BROWN: No, Your Honor.

THE COURT: Very well.

MR. BROWN: You mean this about the long distance call to God? Is that what you mean?

THE COURT: That's right. All right. Here's the ruling on defendant's Motion to Suppress Statements. It's going to be sustained in part and overruled in part.

MR. FREDMAN: Do I get to choose which part?

THE COURT: All right. I'm going to sustain defendant's Motion to Suppress any oral statements made by the defendant before the cassette. I'm going to overrule defendant's Motion to Suppress both the first and second side of the cassette statements. I'm going to overrule defendant's Motion to Suppres the video tape statement. I'm going to sustain the defendant's Motion to Suppress any statements the following day.

Any question about the ruling by the State?

INSTRUCTION NO. C

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. _____, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Birdie Johnson.

You may also consider

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the murder of Birdie Johnson was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. Whether Birdie Johnson was a participant in the defendant's conduct or consented to the act.

4. Whether the defendant was an accomplice in the murder of Birdie Johnson and whether his participation was relatively minor.

5. Whether the defendant acted under extreme duress or substantial domination of another person.

6. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. The age of the defendant at the time of the offense.

Instruction Refused
George A. Adolf
Judge

FILED
JUL 17 1981
JOSEPH P. RODDY
CLERK CIRCUIT COURT
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If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Instruction Refused

George A. Alff

Judge

FILED

JUL 17 1981

JOSEPH P. RODDY

CLERK, CIRCUIT COURT

95.

numbered D, as in David, which is not in MAI citing Godfrey vs. Georgia, 100 S.Ct. 1759, a 1980 case defining torture and also defining depravity of mind. I'm refusing to give it because there is no such requirement under the Missouri Approved Instructions for criminal cases in Missouri that these definitions be given.

I guess the State is worried that the jury has a roving commission if the definitions are not given. The Court feels the other way, that it's a great risk to give these definitions when they haven't been approved and they could be misleading as later decided by Missouri courts. And since no definition is required, whether requested or not, of these terms under MAI, I'm not giving the definition.

Does the State have any additional instructions it wishes to offer?

MR. BROWN: No, Your Honor.

THE COURT: Let the record show the defendant has offered an additional instruction numbered C. Well, I've numbered it Instruction No. C. The defendant has numbered it 15.44 and it's an alternate to the 15.44 that I've given. It includes elements that I refused to give, such as whether the murder of Birdie Johnson was committed while the defendant was under the influence of extreme mental or emotional distress. There's no evidence to support that, that's why I'm not giving this instruction.

INSTRUCTION NO. 33

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 32, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Birdie Johnson.

You may also consider

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the defendant was an accomplice in the murder of Birdie Johnson and whether his participation was relatively minor.

3. Whether the defendant acted under extreme duress or substantial domination of another person.

4. The age of the defendant at the time of the offense.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Instruction Given

George A. Adelf

Judge

FILED

JUL 17 1981

JOSEPH P. RODDY
CLERK, CIRCUIT COURT

85

A Well, I work in the confectionary at home.

Q Okay. Do you know a person by the name of Elroy Preston?

A Yes, sir.

Q How long have you known him?

A Ever since I can remember.

Q Do you know a person by the name of Tracy Rowan?

A Yes, sir.

Q And how long have you known him?

A Since I was about eleven, maybe ten.

Q Okay. I'm going to call your attention to a time period before July of last year and ask you if you knew Elroy Preston then?

A Yes, sir.

THE COURT: All right. Does anybody object to Randy Howard remaining in the courtroom? He has testified. Anybody object to it?

MR. BROWN: The State has no objection, Your Honor.

THE COURT: All right.

MR. FREDMAN: I have no objection.

THE COURT: Continue, Mr. Fredman.

Q You knew Elroy Preston?

A Yes, sir.

Q Okay. In about July, or before July of 1980, had you ever had any problems with Elroy Preston?

A I didn't understand your question.

Q Well, did you ever have any fights or disputes or

money problems with him? A Yes, sir.

Q Okay. Let's talk about money problems, okay? What type of money problems did you have with him?

A Well, we had been playing chess one day. I accidentally knocked over his chess board, ivory chess board or some -- supposed to be valuable chess board.

Q Okay. And where did this take place at?

A In his basement.

Q And did he live in the next block or something, near you?

A He stayed nine houses away from me.

Q All right. Now, when this happened, can you give us a time frame, like about what month did this happen, what year?

A I think it was about May, May or June of '80.

Q Last year? A Yes, sir.

Q Okay. Now, when that happened, when you got up and knocked over that chess board, what was Elroy's response?

A "I'm going to kill you. What's wrong with you", and a few other --

Q He was mad, I take it? A Yeah.

Q Had Elroy ever expressed displeasure with you before?

MR. BROWN: Judge, I'm going to have to object to the relevancy of all this.

THE COURT: Sustained.

Q (By Mr. Fredman) Your mother described Elroy as kind

of a bully. Is that true?

MR. BROWN: Judge, I object to the leading form of the question, leading and suggestive. Also object to the relevancy.

THE COURT: Overruled.

Q (By Mr. Fredman) Is that true, was he kind of a bully? A Yes, sir.

Q Did he ever ask for the money for the chess board?

A Several times.

Q Okay. And when you say "several times", during what time period did he begin to ask for the money?

A Well, immediately after I knocked the board over, one. And then the next week and about every time that I seen him just about.

Q Okay. Did you run around with him on a regular basis or did you only see him occasionally in the neighborhood?

A Well, I only seen him occasionally in the neighborhood.

Q Okay. Did you ever pay -- Did he tell you how much money he wanted? A Yes, sir.

Q How much? A Forty dollars.

Q Did you ever pay anything on that, make any installment at all up to -- let's say during the month of June of 1980? A Yes, sir.

Q Okay. But you hadn't paid it off as of July of 1980?

A No, sir.

Q Okay. I call your attention to the evening of July the 4th, 1980, and ask you if you were at home that evening?

A Yes, sir.

Q Okay. Do you recall who else was there?

A My mother was at home and me and my nephew -- rather me and my step-nephew were in the basement.

Q Okay. Now, who is your step-nephew?

A Tracy Rowan.

Q Okay. You consider him your nephew?

A Somewhere up in there. I don't know what kin he is.

Q Is it fair to say you felt that he was related to you?

A Yes, sir.

Q Okay. What were you doing on the evening while you were at home?

A Well, we was sitting down the radio -- I mean down in my basement listening to the radio and drinking beer.

Q Okay. And at any time during that particular evening, did you have the occasion to leave your house?

A Yes, sir.

Q Now, what time did you leave your house?

A About between 11:00 at night and about 12:00, 11:00 to midnight.

Q Okay. When you left, had your mother gone to sleep yet?

A Yes, sir.

Q All right. And did you take anybody with you when you left? A Tracy.

Q Okay. And where were you going or where did you go?

A We went to a party. Well, we was on our way to a party.

Q Okay. And did something stop you on the way to that party? A Yes, sir.

Q And what was that?

A Elroy, his brother and his girlfriend.

Q And where were they at?

A Sitting on his front porch.

Q Okay. And did you have the occasion to have a conversation with them? A Yes, sir.

Q Okay. And did you spend any time there with them?

A About thirty-five or forty minutes.

Q And during the course of that time period of thirty-five to forty minutes, what did you do there?

A We drunk beer. We -- I just -- We discussed the money problem I was having with him.

Q Okay. And when you say that you discussed it, what is it that you discussed?

A Well, he was telling me that it's a must that he have his money tonight or tomorrow, and I was telling him that like I would get him the rest of his money whenever I went to work with my father again.

Q Okay. Did you have the occasion to leave that location?

A Yes, sir.

Q Okay. And who did you leave with?

A Tracy.

Q And do you recall about what time you would have left?

A About 12:15, 12:30.

Q Okay. And where did you go?

A We went on to the party.

Q Okay. How long did you stay at the party?

A About an hour and a half or maybe two hours. I really don't know.

Q All right. Did you have anything more to drink at the party?

A No, sir.

Q Okay. Did you have anything to drink at Elroy's?

A Yes, sir.

Q Okay. What were you drinking at Elroy's?

A Beer and Canadian Mist.

Q Okay. When you came back when you left the party, where did you come back to?

A My basement.

Q Okay. And when -- Did anybody come back to the basement with you?

A Tracy Rowan, yes, sir.

Q And when you got back to the basement with Tracy Rowan, what did you do then?

A Well, we was drinking more beer and I was sitting

back listening to the radio.

Q Can you estimate about how many beers that you had had during the course of that evening thus far?

A About a case or twenty-four.

Q Was that during the course of the entire day?

A Yes, sir.

Q Okay. Now, did anything happen when you were back there in your basement?

A Yes, sir. We was sitting down, listening to the radio and talking. And then all of a sudden somebody came knocking at the door and I heard my dog barking upstairs. I figured it would wake my mother up, so I ran to the door.

Q Who was at the door? A Elroy Preston.

Q And did you invite him in?

A Yes, sir.

Q And did he come downstairs?

A Yes, sir.

Q Okay. And when he got downstairs, what happened then?

A Well, he told me that he wanted to go across the water over to East St. Louis and to a party hisself and that he wanted his money then, that he wanted his money.

Q Did you give him any money?

A Five dollars.

Q Okay. Did that satisfy him?

A No, sir.

Q What happened then?

A Well, he grabbed me. He grabbed me at my collar, told me to empty my pockets and I told him, you know, told him all right, he don't have to talk so loud because he was kind of hollering and I figured he'd wake my mother up. So I told him not to talk so loud. I emptied my pockets and didn't have no money. He told my nephew and them -- Tracy to empty his pockets and he emptied his pockets, he didn't have no money.

And then he let us loose and told me, you know, I'm going to give him his money. I told him, "I'm going to give it to you whenever I come home -- whenever I go to work with my father." He told me, "No, that ain't going to do. I need that money tonight." And I told him, "Well, it ain't too much I could do right now." So I went around my room looking to see whether I may have hid some money or money I may have been saving or something and I didn't find nothing.

Q Excuse me. When you came to the point that you did not have any money, any more money and he discovered that, what happened next?

A Well, he asked me and my nephew was Miss Johnson home. I told him I didn't know. My nephew said he believed so because we had been sitting out on the side of our house all day and we hadn't seen her leave or come or nothing.

Q Elroy is the one that initiated the discussion about

Mrs. Johnson? A Yes, sir.

Q Okay. And did he say anything else about Mrs. Johnson?

A Well, he said like -- he said that well, we -- the way I'm going to get his money was that we was to burglarize the house and if I was to go into the house, that he would, you know, he ain't going to mess with me and I told him --

Q What was the purpose in going into Miss Johnson's house?

A He wanted to get some money so he could go across the water that night, over to a party that night.

Q How did he know Mrs. Johnson would have any money?

A Well, he asked Tracy had his sister or somebody got her check or something and Tracy told him, "Yeah." Tracy said, "I know she got some money. It's around the 3rd or 4th."

Q So did you tell Elroy that you weren't going to do that? A Yeah, I --

MR. BROWN: Well, Your Honor, I'm going to object to the leading form of the question.

THE COURT: Sustained.

Q (By Mr. Fredman) Okay. You didn't -- What did you do next?

A Well, I told Elroy that Miss Johnson was -- me and her was cool. I told him like that, and that I told him I'd definitely have his money for him whenever I come home from

off work, you know. And he told me, he said he didn't want to hear that crap and told me to come on. So I went over into my room and I went in, got my house shoes, put on my tennis shoes and I went back over into the other room and he told me, you know, "You may as well stop talking out the side of your head. I ain't going for it. You're going to give me my money." He got disgusted last time we had trouble, last time we had got into an argument.

Q Did you eventually leave the basement?

A Yes, sir.

Q Okay. And when you left the basement, who was with you?

A Tracy and Elroy.

Q Okay. And where did you go?

A Around Miss Johnson house through the alley.

Q And did you climb up on the fence?

A Yes, sir.

Q And did you open the window?

A Yes, sir.

Q And did you go into that apartment?

A Yes, sir.

Q Okay. Now, were you the first, second or the third into that apartment?

A I was the first.

Q And when you got into the apartment, which room did

Q How much had you paid him?

A About fifteen dollars.

Q And you say that on July 4th you gave another five, so you had given him about half the money, you only owed him about another twenty dollars?

A Thirty-five -- well, right, twenty dollars.

Q Do you have a TV down in the basement?

A No, sir.

Q Have you ever had a TV down there?

A No, sir.

Q Have you ever wanted to have a TV down there?

A No, sir.

Q You never wanted to have a TV down in your basement?

A No, sir.

Q So that's not the reason you went over there to Birdie Johnson's house?

A No, sir.

Q To get a TV?

A No, sir.

Q You knew she had a TV?

A Yes, sir.

Q In fact, you knew she had two TV's?

A Yes, sir.

Q You're saying during the course of this evening -- Did I understand you to say that over the course of the day you personally had a total of twenty-four beers?

A Yes, sir.

Q Plus you had some Canadian Mist?

DEFENDANT'S EVIDENCE RE PUNISHMENT

HENRY BATTLE

having first been duly sworn by the deputy clerk, testified:

DIRECT-EXAMINATION by Mr. Fredman:

Q Would you state your name for the record?

A Henry Battle.

Q And, Henry, you're Thomas' father, is that right?

A Yes, sir.

Q Okay. You sat here throughout most of the trial and you've testified in the trial, right?

A Yes, sir.

Q Okay. Can you tell the ladies and gentlemen of the jury, in your own words, why you think he might be benefited by fifty years in the penitentiary as opposed to death?

A Well, my honest desire is to spare him, to sentence him for the fifty years. I would feel much thankful for it than I would the death penalty.

Q Has Thomas, during the rest of his life, ever given you any trouble? A No, sir.

Q Has he basically minded you when you asked him to do things?

A Well, I couldn't say altogether. He's been some concern to the family. Some things he's been nice about.

Q Do you feel that his life has any redeeming qualities

at all?

A Yes, sir, I really do. I believe it would, if he had a chance.

MR. FREDMAN: I think that's all I have.

THE COURT: Do you have any questions, Mr. Brown?

MR. BROWN: No, Your Honor.

THE COURT: Mr. Battle, you can step down.

MR. FREDMAN: Arnetha Battle.

THE COURT: Swear Arnetha Battle.

oOo

ARNETHA BATTLE

having first been duly sworn by the deputy clerk, testified:

DIRECT-EXAMINATION by Mr. Fredman:

Q Would you state your name for the record, please?

A Arnetha Battle.

Q And you're Thomas' mother?

A Yes, I am.

Q And you've been here throughout most of the course of this trial?

A Yes, I have.

Q You've heard the sentence -- You've heard the decision of the jury with respect to guilt for capital murder and now we're in the process of having a hearing to determine sentencing.

A Yes.

Q Is there anything that you would add, that you could tell to the members of the jury as to why you feel that Thomas

should not be sentenced to death?

A Well, sir, onliest thing that I could say is this: Thomas has been awfully slow in learning all his life. We have tried talking to him and getting -- trying to get him to -- to get across to him to learn more and to study more. Some children -- I don't know how to explain myself. Some children, you can give them a book and they can understand it right away without you even saying A, B, C. Then some, you have to just probe in them their ABC's or different things like that in order for them to know it. And Thomas just naturally, he has been slow learning ever since he been born in the world. He was fourteen months old before he was able to even walk. So that's the reason why I think it would be better really, truly, to try to save his life, so that he might learn, so that he can live in this society of this world, because I believe he would be a better boy after this.

Q Do you think that he would be a more productive citizen in whatever capacity at the penitentiary --

A I believe so, sir.

Q -- than if his life was snuffed out?

A I believe so. I believe he would be a better boy.

Q Have you noticed a change in him in the year that he's been over at the City Jail?

A Yes, sir. He'd been very quiet and he talks and try to keep me cheerful.

Q Has he written you letters since he's been in the jail?

A Yes, sir, he has.

Q And I believe that you testified during the other proceeding that you -- that you visited him on several occasions?

A Yes, sir.

Q Have you ever had any serious problem with any of your other children?

A No, sir. He the onliest one that didn't walk until after he was fourteen months. All the rest of them walked when they was eight months.

Q I'm talking about, you know, like --

A Trouble?

Q Trouble.

A No, sir.

MR. FREDMAN: I don't have anything further.

THE COURT: Do you have any questions, Mr. Brown?

MR. BROWN: No, Your Honor.

THE COURT: Mrs. Battle, you may step down.

MR. FREDMAN: Eliza McCoy.

oOo

ELIZA MC COY

having first been duly sworn by the deputy clerk, testified:

DIRECT-EXAMINATION by Mr. Fredman:

Q Would you state your name, please?

A Eliza McCoy.

83-6568

IN THE SUPREME COURT FOR THE UNITED STATES

K

STATE OF MISSOURI,
Respondent,
vs.
THOMAS HENRY BATTLE,
Appellant.

Cause No.

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now Thomas Henry Battle, appellant herein named, by and through his attorney, Rick Sindel, Assistant Special Public Defender for the Office of the Special Public Defender, 21st. and 22nd. Judicial Circuits for the State of Missouri, and shows to the Court that appellant desires to petition this Court by Writ of Certiorari and that the appellant is unable to do so because he is indigent and is unable to afford to pay court, transcript, or travel costs.

WHEREFORE, appellant prays the court to enter an order authorizing an appeal as a poor person and therein provide all court, transcript, and travel without cost to the appellant.

Respectfully submitted,

OFFICE OF SPECIAL PUBLIC DEFENDER

Rick Sindel
Member of Bar
United States Supreme Court

and

Kathryn Shubik
Assistant Special Public Defender

Attorneys for Appellant

83-6568

On Petition for Writ of Certiorari to the Supreme Court of Missouri

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Thomas H. Battle, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress, and that there is merit to the issues raised in my petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Answer: About the 10th of April, 1979-1-10-80. Salary: $450

2. Have you received, within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: No

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

Answer: No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

Answer: No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Thomas H. Battle
Thomas H. Battle

Subscribed and sworn to before me this MAR 26 1984 day of MAR 26 1984, 1984.

Notary Public

JACK JONES
NOTARY PUBLIC STATE OF MISSOURI
MONITEAU CO.
MY COMMISSION EXPIRES JAN 25 1987

83-6568

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY BATTLE,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

JOHN ASHCROFT
Attorney General of Missouri

JOHN M. MORRIS III
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
(314) 751-8767

Attorneys for Respondent

I N D E X

TABLE OF AUTHORITIES

Cases Cited

Supreme Court Rules and Statutes Cited

STATEMENT OF THE CASE

Petitioner Thomas Henry Battle was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the murder of eighty-year-old Birdie Johnson. The facts relating to this offense are fully set out in the opinion of the Supreme Court of Missouri affirming petitioner's conviction and sentence, State v. Battle, 661 S.W.2d 487, 488-489 (Mo. banc 1983), and will not be restated here.

The facts and circumstances bearing upon petitioner's present claims are as follows:

A. Venireman Exclusion Claim

Petitioner made no attempt prior to trial or during voir dire to allege that the exclusion of persons who could never under any circumstances consider imposing a sentence of death violated his right to a jury selected from a fair cross-section of the community; the first such claim was advanced after his conviction, in his Motion for New Trial. As a result, no evidence was ever presented by petitioner to support his claim. On appeal, this contention was rejected by the Missouri Supreme Court. State v. Battle, supra at 491-492.

B. Suppression of Statement Claim

Prior to trial, petitioner filed a motion to suppress the various oral, tape-recorded and videotaped statements he had given to police in which he had confessed to the murder (Petitioner's Appendix, hereinafter "Pet.App.," E-4). An extensive evidentiary hearing was held on this motion, in which the police officers who questioned petitioner testified that he had repeatedly been advised of and explicitly waived his Miranda rights, including the right to counsel, while petitioner claimed that he had asked for and been denied an attorney. See State v. Battle, supra at 489-490 for a

summary of the state's evidence. The trial court, while granting the motion to suppress as to some collateral statements, credited the State's evidence as to two particular confessions and denied the motion to suppress as to them. Id. at 489-491. The Missouri Supreme Court adopted the trial court's conclusion as to credibility. Id. at 491.

ARGUMENT

A. The Attack Upon Witherspoon

What petitioner disingenuously describes as a "misinterpretation" by the Missouri Supreme Court of Witherspoon v. Illinois, 391 U.S. 510 (1968) is in fact his attempt to claim that the doctrine enunciated by this Court in Witherspoon and subsequent cases is "unconstitutional" as violating the right to selection of a jury from a fair cross-section of the community. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975). In Witherspoon, this Court explicitly recognized the principle that a venireman can constitutionally be excused for cause if (1) he could not consider imposing a sentence of death regardless of the evidence introduced; or (2) his attitude toward capital punishment would prevent him from making a fair and impartial determination as to guilt. Id. at 522 (n. 21). This same principle has been restated on subsequent occasions by this Court. Lockett v. Ohio, 438 U.S. 586 (1978); Adams v. Texas, 448 U.S. 38 (1980). Indeed, the identical "fair cross-section" theory advanced by petitioner has been rejected in this Court's past decisions:

> "Nothing in Taylor . . . suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." Lockett v. Ohio, supra at 596-597.

See also Adams v. Texas, supra at 50; Maggio v. Williams, __ U.S. __, 104 S.Ct. 311, 313-314, 78 L.Ed.2d 43 (1983). Petitioner's creative attempt to overrule the Witherspoon doctrine sub silentio by citation of the Taylor line of fair cross-section cases cannot withstand the above-quoted language.

Until recently, the notion that "Witherspooning" a jury panel violated fair cross-section principles had been rejected out of hand by every state and federal court which had ever considered the question. See, e.g., Smith v. Balkcom, 660 F.2d 573, 582-583 (5th Cir. 1981), modified 671 F.2d 858

(1982), cert. denied __ U.S. __, 103 S.Ct. 181 (1983); People v. Free, 94 Ill.2d 378, 447 NE 2d 218, 229 (1983); State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315, 1319 (1983); State v. Stokes, 637 S.W.2d 715, 722 (Mo. banc 1982), cert. denied __ U.S. __, 103 S.Ct. 1263 (1983); Harrell v. State, 249 Ga. 48, 288 SE 2d 192, 195 (1982). Within the past year, however, two federal district judges have seen fit to ignore the language of Lockett and Adams, and numerous other legal principles, in an attempt to overrule the Witherspoon doctrine on this ground. Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), appeal pending sub nom Mabry v. Grigsby, No. 83-2113-EA (8th Cir banc); Keeten v. Garrison, No. C-C-77-193-M (W.D.N.C., January 12, 1984). These rulings are, or soon will be, before their respective Circuit Courts of Appeal. The time may have come when it is appropriate to lay the present theory to rest once and for all. United States Supreme Court Rule 17.1.

B. The Allegedly Coerced Confessions

The frivolous and dilatory character of petitioner's remaining claim in this petition is evident from the fact that it rests upon an issue of fact, not law. At the evidentiary hearing on petitioner's motion to suppress statements, petitioner claimed that his confessory statements were taken despite requests for an attorney, and the police officer witnesses testified that petitioner repeatedly waived his right to counsel and never asked for an attorney. See State v. Battle, supra at 489-491, in which the state's evidence on this issue is set out in detail. As to the two statements introduced at trial, the trial court necessarily concluded that petitioner had indeed waived his Miranda rights. Id. at 491. The evidence supporting the trial court's conclusion, set out in the Battle opinion, is either flatly ignored or misstated in petitioner's "Statement of the Case." Obviously,

it was for the state courts to resolve this factual dispute, see Sumner v. Mata, 449 U.S. 539 (1981), and petitioner cannot relitigate the state court's finding of fact by means of a certiorari petition.

CONCLUSION

In view of the foregoing, the respondent submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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